

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 12-57

May 24, 2012

TO: Regional Directors, Officers-in-Charge, Resident Officers,
Compliance Supervisors and Compliance Officers

FROM: Anne Purcell, Associate General Counsel

SUBJECT: Electronic Distribution/Posting of Notices and Reading of Notices

In *J & R Flooring, Inc. d/b/a J. Picini Flooring and Freeman's Carpet Service, Inc. and FCS Flooring, Inc.*, 356 NLRB No. 9 (2010), the Board modified the current notice-posting requirement to include electronic distribution/posting of the Notice to Employees (and Members) by charged parties/respondents (hereinafter referred to as charged parties) that customarily communicate with employees or members by electronic means. As you may recall, a comprehensive survey was distributed tracking how Regions were enforcing the Board's decision in *Picini Flooring* which included questions concerning reading of the Notice to Employees (and Members) pursuant to an informal settlement agreement.¹ The surveys were completed by supervisory compliance officers, compliance officers and some Regional managers. A Committee reviewed and analyzed the responses to the surveys and from the data compiled prepared the following best practices.²

ELECTRONIC DISTRIBUTION/POSTING OF NOTICES

1. How and when should the Region investigate and determine whether an electronic distribution or electronic posting of a Notice is appropriate?

During the course of an unfair labor practice investigation Board agents should investigate whether the charged party customarily communicates with its employees or members electronically. Factors to be investigated are set forth below and are also highlighted in Unfair Labor Practice Proceedings, Casehandling Manual Sections 10054.2(e) and 10132.4(b).

- The existence of a charged party's intranet and the frequency and types of postings included on that site.

¹ Although this OM specifically mentions informal settlement agreements, all principles discussed herein should also be applied to formal settlements.

² The Committee consisted of Compliance Officers Roger Czaia, Region 18, Annette Lewis, Region 14; Shane Thurman, Region 4; Hokulani Valencia, Region 32, and AGC Beth Tursell, Division of Operations Management.

- The existence of a charged party's e-mail system, the frequency of the use of that system to make broadcast e-mails to groups of employees and the subject matters covered.
- The number and accessibility of traditional notice-posting areas at the work site and the degree to which employees work off-site or would otherwise be unlikely to see traditional notices.

When a Region determines that a case has merit, the Region should also determine whether the charged party should electronically distribute via e-mail and/or electronically post the remedial Notice based on the results of investigation of the above factors. Thus, if the investigation reveals that the charged party routinely communicates via postings on the intranet site or website or broadcast e-mails, it would be appropriate to seek an electronic posting or distribution remedy.

2. How should the Region determine to whom the Notice should be distributed?

When unfair labor practices are committed by an employer, Notices should be electronically distributed to all employees who customarily receive electronic communications from the employer who are employed at the location where the unfair labor practices occurred.³ When unfair labor practices are committed by a union, Notices should be electronically distributed to all members of the union if the union customarily communicates with its members in that manner. If it is determined that only certain employees or union members customarily receive electronic communications, then the informal settlement agreement should identify those employees or union members to whom the Notice will be transmitted electronically. For example, if the charged party is a manufacturer and communicates only with its sales force via e-mail, it would be appropriate to limit the electronic distribution of the Notice to the sales force.

3. Should an agreement be reached on the use and content of a cover e-mail from the charged part transmitting the electronic copy of the Notice?

The informal settlement agreement should address the language(s) to be used by the charged party in the e-mail transmitting the Notice to the employees/members. The following language is suggested and has been incorporated into the informal settlement agreement template in NxGen.⁴

³ In the event the charged party/respondent objects to this remedy, the Director has the discretion to limit the electronic distribution as s/he feels appropriate.

⁴ The informal settlement agreement template in NxGen has been revised to reflect all of the changes announced herein. The informal settlement agreement template has also been revised to include the following: insertion of specific Notice posting locations and the statement that withholdings should not be made from the interest portion of the backpay.

We are distributing the attached Notice to Employees to you pursuant to a Settlement Agreement approved by the Regional Director of Region _____ of the National Labor Relations Board in Case(s) _____.

4. How should the Region be notified that the electronic distribution has occurred?

In cases where electronic distribution is part of the remedy, the letter initiating compliance will specify that the charged party will e-mail a copy of the signed Notice to all employees who work at a specific location. Additionally, the letter will specify that the e-mail transmitting the Notice (with all of the recipients' e-mail addresses) must be forwarded to the Compliance Officer at the time the Notice is sent to employees.

In addition, the compliance certification form which will be included in the letter initiating compliance will include a provision addressing electronic distribution.

5. How can the Region determine where the Notice should be electronically posted?

Board agents should routinely investigate the charged party's usage of an intranet site or website to communicate with employees during the initial investigation. When unfair labor practices are committed by an employer, the Notices should be posted electronically on any intranet site or website that the employer customarily uses to communicate information to employees who are employed at the location where the unfair labor practices occurred and who customarily receive such electronic communications. When unfair labor practices are committed by a union, the Notices should be posted electronically on any intranet site or website that the union customarily uses to communicate information to its members.

6. How should the Region be notified that electronic posting occurred?

The compliance certification form will also include a provision addressing electronic posting. The letter initiating compliance will specify that the charged party will submit a paper copy of the intranet site or website posting when it returns the completed certification form and provide a password for a password protected intranet site or website in the event it is necessary to check the electronic posting.

7. Is a charged party required to distribute/post Notices electronically at multiple facilities or at a national level?

An employer is required to electronically distribute via e-mail and/or post on its intranet site or website Notices for employees at all locations where the unfair labor practices occurred, even when this necessitates a nationwide electronic distribution. An employer is required to electronically distribute/post Notices for those employees who customarily

receive information from it via either of these electronic means. A union is required to electronically distribute via e-mail and/or post on its intranet site or website Notices for all members employees who customarily receive information from it via either of these electronic means.

NOTICE READING

1. When a Region has determined that a Notice reading is required, how should the Region determine who should read the Notice and to what extent should the Region participate in the Notice reading?

At the time a decision on the merits of a case is made, the agenda committee will also determine whether reading of the Notice is appropriate. In accordance with GC 11-01, a Notice reading should be done by a responsible representative of the charged party. However, a Board agent should attend the Notice reading in order to verify that it has occurred. If it is not feasible for a Board agent to attend a Notice reading due to the charged party's facility being an unreasonable distance from the Regional Office, then the charged party will be required to submit a certification confirming when the reading occurred and who did the reading. If a party will not enter into the settlement agreement unless the Notice is read by a Board agent, Regions should evaluate each party's position on the issue and make a determination on a case-by-case basis as to whether a Board agent reading is appropriate. The settlement agreement should specify whether the Notice will be read by a responsible representative of the charged party or the Board agent.⁵

2. How should the announcement be made informing employees/members of the Notice reading?

The charged party should announce the meeting for the Notice reading in the same manner it would customarily announce a meeting for employees/members. If the charged party is an employer, it must require that all employees at the location(s) where the unfair labor practice(s) occurred attend the meeting. If the charged party is a union, it must conduct the reading at either a regularly scheduled general membership meeting or a specially scheduled general membership meeting. The language the charged party will be using in making the Notice reading announcement should be approved by the Regional Director prior to the time the Notice reading announcement is made.

3. How should the Region determine when the meeting for the reading of the Notice should be held?

The meeting for the Notice reading should be held at times when the charged party customarily holds employee or member meetings and must be completed prior to the completion of the 60-day Notice posting period. The date and time of the reading must be approved by the Regional Director.

⁵ Both options are included in the NxGen Settlement Agreement template.

4. If a Notice should be read in other languages, what arrangements should be made?

A foreign language Notice should be read by a pre-determined responsible representative of the charged party who is fluent in that particular foreign language. To the extent feasible, either a Board agent fluent in that particular foreign language or an interpreter should attend the reading to verify that the Notice was read properly. These requirements should be specified in the Settlement Agreement.

5. If problems are encountered during the reading of the Notice, what is the role of the Board agent?

Potential skip counsel issues ordinarily would not arise if the Board agent visiting the facility speaks ex parte with a responsible representative of the charged party only for the purpose of finding the location where the Notice will be read and listening to the reading of the Notice. The skip counsel rule (ABA Model Rule 4.2) would be implicated, however, if the Board agent, while listening to the reading of the Notice, engages in a substantive dialogue about the case, which is still open pending compliance, with a person who would fall within the Rule's protections. Therefore, Board agents can only engage in limited ex parte contacts with a responsible representative at the charged party's facility for the purpose of finding the location where the Notice will be read and listening to the reading of the Notice. The Board agent should exercise caution that he or she does not engage in any substantive conversation about the subject of the representation or any topic that in any way affects the underlying unfair labor practice. The Board agent should also be careful not to elicit or obtain any attorney-client privileged information. In the event the reading is inadequate or improper, communications about such issues should be with the attorney representing the charged party.

If you have any questions regarding this memorandum, please contact your AGC or Deputy or the undersigned.

/s/
A.P.

Attachments
cc: NLRBU

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